Here’s Some Malarkey: Judges Are Umpires

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Barack Obama was lambasted for saying Supreme Court nominees should have the “empathy” to appreciate what it’s like to be poor, black, gay or a young teenage mother.

Didn’t he know that judges must follow the law, not do whatever “feels” right? Didn’t he recognize, as Chief Justice John Roberts famously observed, that “judges are like umpires” who “don’t make the rules” but “apply them”?

That sounds right. It just happens to be malarkey.

When justices interpret the Constitution, there are no clear rules to apply. The Constitution speaks in only vague terms about values like equal protection, cruel and unusual punishments, and unreasonable searches. Its text provides little guidance for practical implementation. Does equal protection mean gays can marry? Is capital punishment cruel and unusual? Is it unreasonable for the police to search your trash?

Nor is the problem solved by finding the Framers’ intent. There was, after all, not just the Framers but many, and they were hardly of one mind. As Justice Robert Jackson candidly admitted, the search for the Framers’ intent “must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret” and often supplies “apt quotations from respected sources on each side of any question.”

Without adequate guidance from the Constitution or the Framers’ intent, Supreme Court justices are forced to use their discretion. And, in doing so, the ability to empathize is critical.

A case in point is the Court’s recent decision about legislative prayer. The issue was whether the opening prayers at board meetings in a small upstate New York town violated the First Amendment’s Establishment Clause. For over a decade the board meetings began with prayers delivered by Christian prayer leaders who often used overtly Christian references (“We acknowledge the saving sacrifice of Jesus Christ on the cross”). There were only four occasions when prayers were led by non-Christians leaders, and this occurred only after the plaintiffs in the case objected.

The Establishment Clause doesn’t answer whether these legislative prayers are unconstitutional. It merely forbids government actions “respecting an establishment of religion.” It gives no guidance as to what constitutes an unlawful “establishment.”

The Framers’ intent is equally inconclusive. The Congress which sent the First Amendment to the states for ratification clearly thought legislative prayer permissible because it hired its own chaplains to deliver prayers. Justice Kennedy, writing for the Court’s majority, thought this conclusively demonstrated “that the Framers considered legislative prayer a benign acknowledgment of religion’s role in society.”

But the dissenting justices, led by Justice Elena Kagan, never denied that legislative prayer could be constitutional. Their concern was with the town board’s pattern of using only Christian prayer leaders who used overtly Christian references.

The dissenters said that even members of the Framers’ generation, who lived when the United States was almost entirely Christian, took pains to avoid overtly sectarian references. George Washington deleted from his first inaugural address a reference to “the blessed Religion revealed in the word of God” because it would be understood to mean Christianity. Thomas Jefferson omitted any reference to Jesus Christ in the Virginia Bill for Establishing Religious Freedom to clarify that the law applied to “the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.”

With neither the Constitution nor the Framers’ intent providing an answer, the justices had to revert to their discretion. What is the Establishment Clause’s underlying value? Did the town board’s practice comport with it?

For the dissenters the answer was obvious. The Establishment Clause’s purpose is to ensure that every American has equal standing in the political community regardless of his or her belief or lack of belief. Town board meetings that repeatedly begin with overtly Christian prayers given by Christian clergy violate this principle. They send a signal that Christians are favored members of the community and everyone else is an outsider.

The dissenting justices empathized with the town’s religious minorities. The justices put themselves in the minority groups’ shoes and were able to appreciate that they felt like second-class citizens.

But for the five justices in the majority – all Catholic men – the town board’s practice was no big deal. They were merely calling balls and strikes and there was nothing in their comfortable world view to alert them to any problem.

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